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No. 80-644

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

G.D. SEARLE & COMPANY,

Petitioner,

vs.

SUSAN COHN and WALTER COHN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

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I. The New Jersey Tolling Statute Imposes An Undue, Discriminatory, And Impermissible Burden On Interstate Commerce.

Under the New Jersey tolling statute, foreign corporations that are not "doing business" in New Jersey and that have thus not registered agents in the State are prohibited from *ever* raising the defense of the statute of limitations. In contrast, domestic New Jersey corporations, corporations that qualify to "transact business" in New Jersey, and essentially all other litigants are permitted this defense.

As Searle demonstrated in its opening brief, this anomaly violates the Commerce Clause for three independent reasons.[1] First, it burdens Searle's federally protected right not to register

[1]Searle's opening brief further demonstrated that the tolling statute violates the Due Process and Equal Protection Clauses. Pet. Br. 29-34.

(Footnote continued on following page.)

in New Jersey and is *per se* invalid. Second, it unjustifiably discriminates against interstate commerce, contrary to a long line of decisions of this Court. Third, the burden on interstate commerce is "clearly excessive in relation to the putative local benefits." *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Respondents have offered no response to these arguments. Indeed, their principal claim is the startling contention (Resp. Br. pp. 22-28) that for New Jersey to deny its statute of limitations to out-of-state corporations *alone* does not interfere with interstate commerce at all.

A. *Per Se* Invalidity.

New Jersey's registration requirement and tolling provision constitutes precisely the kind of undue and discriminatory burden on interstate commerce that this Court has repeatedly held to be *per se* invalid. Foreign corporations that are engaged exclusively in interstate commerce have a federal constitutional right to be free of licensing schemes or requirements that the corporation "render[s] itself amenable to suit in all the courts of the State by whosoever chooses to sue it there." *Sioux Remedy Co.* v. *Cope*, 235 U.S. 197, 205 (1914); see also, *Eli Lilly & Co.* v. *Sav-On-Drugs*, 366 U.S. 276, 278-79 (1961).[2] *A fortiori*, states cannot

(Footnote continued from previous page.)
There is no reason to repeat these arguments here, however, because respondent's sole response to them has been to misstate them. Resp. Br. pp. 19-20. Searle's claims are *not* premised on any notion that States do not have discretion in determining limitations periods. Searle does not contend that it is unconstitutional for a State to establish a two year limitation period for personal injury suits and to provide that the limitations period does not begin to run until the plaintiff could reasonably have discovered the cause of action. Searle's claim rather is that it violates the Fourteenth Amendment for a State to refuse to extend the benefit of this statute of limitations to foreign corporations like it, which are indisputably subject to long arm jurisdiction in proper cases.

[2]As this Court has repeatedly recognized, it would profoundly impede the functioning of the national marketplace if States could burden interstate corporations engaged in exclusively interstate commerce with whatever regulatory requirements they may devise for domestic businesses.

penalize such corporations by enacting discriminatory legislation designed to coerce them into relinquishing this federal constitutional right. See, *e.g.*, *Allenberg Cotton Co.* v. *Pittman*, 419 U.S. 20 (1974). This Court has consistently held that states may not deny these corporations important rights in litigation that are available to all other litigants or otherwise penalize them. *Ibid*; *International Text-book* v. *Pigg*, 217 U.S. 91 (1910); see also *Western & Southern Life Ins. Co.* v. *State Bd. of Equalization*, ___ U.S. ___, 49 U.S.L.W. 4542, 4544-47 (May 26, 1981) (States cannot force even foreign corporations "doing business" in a state to relinquish federal constitutional rights).

Yet the New Jersey tolling statute effects precisely such discrimination. It denies the benefit of its statute of limitations to foreign corporations, like Searle, that indisputably have a right not to register an agent and thereby consent to suit in the State by whosoever chooses to sue it there. Moreover, as the District Court and respondents recognized below (Cert. Pet. 44a-45a n.17), the only procedure by which foreign corporations like Searle can register an agent in New Jersey is to qualify to do business and submit itself to New Jersey's licensing scheme.[1]

Respondents' attempt to justify this departure from established principles lacks any substance. Their main contention (Resp. Br. p. 25) is that there is a fundamental "difference in [the] impact" of the New Jersey tolling statute and the statutes invalidated in *Allenberg Cotton Co.* v. *Pittman*, 419 U.S. 20 (1974), *Sioux Remedy Co.* v. *Cope*, 235 U.S. 197 (1914), and like cases. Respondents point out that the statutes in these cases had denied unregistered interstate corporations the privilege of access to state

[1]For example, by obtaining a certificate of authority a foreign corporation automatically becomes required, *inter alia*, to maintain a registered business office, N.J.S.A. §14A: 4-1 (West 1981 Supp.); to file annual reports with the New Jersey Secretary of State, *id.*, §14A:4-5 (West 1981 Supp.), to pay New Jersey franchise tax. *Id.*, §54:10A-2 (West 1981 Supp. & N.J.Ad. Code §18:7-1.6 (1979 Supp.), and to assume whatever other duties are hereafter imposed on domestic corporations. N.J.S.A. §14A:13-2.

courts to sue on their contracts. In respondents' view, this constituted the denial of "an affirmative right necessary to the proper conduct of interstate commerce." Resp. Br. p. 25. In contrast, respondents argue that to deny unregistered foreign corporations a dispositive statute of limitations defense is not "by nature or by degree" the "type" of interference with interstate commerce "condemned historically by this Court" (Resp. Br. p. 27). There is no merit to this argument.

First, denying the statute of limitations to unlicensed foreign corporations imposes a more severe discriminatory burden on interstate commerce than does the denial of the privilege of filing suit in state court. The denial of the statute of limitations to unlicensed foreign corporations absolutely denies them the benefits of repose that the statute affords all other litigants.[4] The inevitable consequence is that nonregistered foreign corporations must incur the "added costs" of defending suits and, in some instances, of paying judgments when domestic New Jersey businesses and all other litigants would have the right to have the suit dismissed on summary judgment. See *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U.S. 333, 351 (1977); *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 127 (1978). This is a far more significant financial burden on Searle than would be the denial of the right to sue on contracts in New Jersey—which would have only a *de minimis* effect on a corporation like

[4]In *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979), this Court emphasized the paramount importance of statutes of limitations to defendants and to our systems of jurisprudence:

> "Statutes of limitations, which 'are found and approved in all systems of enlightened jurisprudence,' *Wood* v. *Carpenter*, 101 U.S. 135, 139 (1879), represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'* * *We should regard the plea of limitations as a 'meritorious defense, in itself serving a public interest.' *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 136 (1938)."

Searle.[5] Moreover, the tolling statute will make unregistered foreign manufacturers like Searle set aside contingency funds in perpetuity, disrupting their financial planning and having profound effects on their nationwide and worldwide operations.

Second, any manufacturer in the United States or the world —even ones that would never have any occasion to bring suit in New Jersey—is a potential defendant in a products liability suit in New Jersey if it is reasonably forseeable its products would end up there. *Cf. World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980). Thus, the New Jersey tolling statutes will affect the fiscal obligations and contingency planning of out-of-state companies that would never have any occasion to bring suit in New Jersey. It will force corporations to register in New Jersey if there is even a remote possibility it could some day be sued there, thereby having a far more profound disruptive effect on the national marketplace than denial of the right to sue.[6]

Finally, the most fundamental defect in respondents' contention is that it ignores that the basis of *Allenberg* is that States cannot impose discriminatory burdens on foreign corporations for

[5]Because Searle is not engaged in intrastate business in New Jersey, it would not be limited to a New Jersey forum for vindicating its rights. It executes its contracts for New Jersey sales in Skokie, Illinois and other locations outside New Jersey and ships products f.o.b. its place of business. It would plainly have non-New Jersey forums available if contract disputes arise. In any event, it could insert forum selection clauses into its sales contracts to assure access to any particular non-New Jersey forum. The added cost of the statute invalidated in *Allenberg* on Searle could ordinarily only be the very minor ones incidental to bringing suit in a slightly less convenient forum than New Jersey.

[6]The tolling statute's interference with interstate commerce is exacerbated by the fact that even when a corporation registers an agent, it only commences the *running* of the two year statute of limitations. Out-of-state businesses will be subject to suit on stale claims for two years even if they register today. In contrast, registration removes any disability on the filing of suits immediately. See, *e.g.*, *Grow Farms Corp.* v. *National State Bank*, 167 N.J. Super. 102, 400 A.2d 535 (1979).

exercising their federal constitutional rights. If respondents were correct that States can withdraw all privileges from foreign corporations except access to court as a plaintiff, the principle could not be contained. If New Jersey can deny the statute of limitations to foreign corporations, it also could create different discovery rules, evidentiary rules, or remedial rules for foreign corporations. The possibility of such anomalies illustrates why states may not use any means whatever to force corporations to relinquish their federal constitutional rights.

B. Impermissible Discrimination And Excessive Burden.

Even apart from its effect of coercing the relinquishment of federal constitutional rights, New Jersey's denial of the statute of limitations to unregistered corporations not "doing business" in New Jersey is precisely the kind of discrimination against interstate commerce[7] that this Court has repeatedly held to be invalid. See, *e.g.*, *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980); *Hughes* v. *Oklahoma*, 441 U.S. 322 (1979); *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U.S. 333, 351 (1977); *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366 (1976).

As in *Lewis*, Searle need not argue or demonstrate that the discrimination is so flagrant that the statute is invalid *per se*. See *Lewis*, *supra*, 447 U.S. at 42. When a statute discriminates against interstate commerce, "the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate

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[7]Any statute that distinguishes between interstate and local concerns and "discriminates *among* affected business entities according to the extent of their contacts with the local economy" or that imposes added costs on out-of-state corporations alone discriminates against interstate commerce within the Commerce Clause. See *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 42 (1980) (emphasis in original); *Hunt* v. *Washington Apple Advertising Comm'n*, *supra*, 432 U.S at 352.

to preserve the local interests at stake." *Hunt, supra*, 432 U.S. at 353; see *Hughes* v. *Oklahoma, supra*, 441 U.S. at 336-338. Neither respondents nor the state has met this burden. There simply is no permissible local benefit flowing from the statute that could not be readily achieved by less discriminatory and less burdensome means.

The original purpose of the tolling statute was to preserve the claims of a New Jersey plaintiff against a foreign corporation when New Jersey could not obtain *in personam* jurisdiction over the corporation. To the extent this problem once existed, it now has been solved in New Jersey—as it has in virtually every other state in the country—by the adoption of rules permitting long arm jurisdiction.[8] There is no doubt that long arm jurisdiction is a less burdensome alternative to the indefinite tolling of the statute of limitations.

Searle has already demonstrated that the other putative local interests identified by the Court of Appeals (Cert. Pet. 22a-24a) are palpably insufficient to justify the tolling statute's discriminatory burden on interstate commerce. Pet. Br. pp. 26-28. Each legitimate local benefit could be achieved by nondiscriminatory means or, in any event, by the adoption of "intermediate" means far short of *indefinitely* denying out-of-state corporations the statute of limitations. Pet. Br. pp. 26-28; see *Lewis, supra*, 447 U.S. at 43.

Respondents further defend the tolling statute on the ground it promotes "public policy reasons" including "adjudicating claims on the merits, preserving plaintiffs' causes of action, and fostering [maximum] accountability of a corporate defendant." Resp. Br. pp. 26-27. These are legitimate local interests. It is elementary,

[8]Nearly every other state has thus held, as a matter of state law, that comparable tolling statutes are inapplicable where, as here, the out-of-state corporation is subject to long-arm jurisdiction. See Cert. Pet. 49a n.21; J. App. 18a-25a.

however, that States may not place the burden of attaining such public policies on out-of-state companies alone. See, *e.g.*, *Philadelphia* v. *New Jersey*, 437 U.S. 617, 628 (1978). If a State wishes to abolish its statute of limitations to promote these goals, it must do so even-handedly with respect to in-state and out-of-state business alike and abolish the limitations defense in *all* cases.

Like the Court of Appeals, respondents also defend the Tolling Statute on the ground it will force out-of-state corporations to register agents and thereby consent generally to suit in New Jersey. This, respondents contend (Resp. Br. p. 26), will avoid "the necessity to set up elaborate, alternative mechanisms by which courts would be forced to determine on a case by case basis which out-of-state corporations are or are not amenable to long-arm service by a particular plaintiff." This Court has held, however, that any State interest in relieving plaintiffs of the obligation of establishing jurisdiction under the fairness standard of the Due Process Clause and thus simplifying litigation for the plaintiff and the Court is illegitimate *per se*. *Shaffer* v. *Heitner*, 433 U.S. 186, 211 (1977); Pet. Br. p. 25.

In any event, because none of the putative local interests are possibly sufficient to justify any interference with interstate commerce, the burden on commerce is clearly excessive. See *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

II. The Only Way Unregistered Foreign Corporations Can Obtain The Benefit Of The Statute Of Limitations Is To Submit To A Licensing Scheme And Generally Consent To Suit In New Jersey.

Finally, respondents seem to attempt to avoid Searle's Commerce Clause claims by contending, contrary to their position below, that it is the law of New Jersey that foreign corporations can register agents in New Jersey and obtain the benefit of the

New Jersey statute of limitations *without* submitting to a licensing scheme (Resp. Br. p. 12) and *without* consenting to suits that could not otherwise be brought in New Jersey courts under the test of *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945).[9] These claims lack any substance. But even if these claims were valid, they could affect only *one* of Searle's claims: the applicability of the principle of *Allenberg Cotton Co.* v. *Pittman*, 419 U.S. 20 (1974).

A. Submission To A Licensing Scheme Is The Only Way Of Registering An Agent In New Jersey.

First, as the District Court indicated (Cert. Pet. 44a-45a n.17), there is only one procedure available under New Jersey law to register an agent to accept service of process and become "represented" in New Jersey for purposes of the New Jersey tolling statute: filing a "certificate of authority" to "transact business" and thereby submitting the corporation to New Jersey's comprehensive licensing scheme. N.J.S.A. §§ 14A:13-1 *et seq.* The legislative history of the tolling statute quoted by the New Jersey Supreme Court in *Velmohos* makes this absolutely clear, for it states that the statute was intended to extend the benefit of the statute of limitations to "foreign corporations *licensed to do business* in New Jersey." *Velmohos* v. *Maren Engineering Corp.*, 83 N.J. 282, 290, 416 A.2d 372, 376-77 (1980), *quoting* Statement Accompanying New Jersey Assembly Bill No. 467 (1949) (empha-

[9] Contrary to respondents' claim (Resp. Br. pp. 15-16), Searle has *not* challenged the Court of Appeals' holdings (1) that the meaning of the tolling statute is that a foreign corporation must have an officer in the State or a registered agent with the Secretary of State in order to claim the benefit of the limitations defense and (2) that the fact that Searle's New Jersey detailmen are unquestionably "servants" acting in New Jersey who may be served with process under N.J. Ct. Rule 4:4-4(c) is *not* sufficient to avoid the tolling statute. Cert. Pet. 15a-17a. However, if this Court is going to consider any issues of New Jersey law raised by respondents, Searle believes it should also consider the correctness of the Court of Appeals' holding on the detailmen issue because the New Jersey Supreme Court has never approved it.

sis added). Indeed, respondent has heretofore argued that the purpose of the tolling statute is to "induce licensure" by foreign corporations. Cert. Pet. 44a n.17. Respondents recognized below that licensing is the only way plaintiffs can be assured "access to defendants by contacting the New Jersey Secretary of State." See Resp. Br. p. 16.

In now contending that a foreign corporation *can* register an agent with the New Jersey Secretary of State without qualifying to transact business in New Jersey, respondents rely exclusively on the following statement from a footnote in the New Jersey Supreme Court's Opinion in *Velmohos*: "whatever hardship on foreign corporations might be caused by continued exposure can be easily eliminated by the designation of an agent for service of process within the State." 83 N.J. at 291 n.10, 416 A.2d at 378 n.10. However, there is nothing in this footnote that even remotely suggests that the New Jersey Supreme Court held—contrary to the very legislative history it quoted on the previous page of its opinion (83 N.J. at 290)—that agents can be designated by any means other than filing a certificate of authority. The New Jersey Court necessarily recognized that the means of avoiding the tolling statute is to follow the only existing procedure for registering an agent: qualifying to do business.

If there were any doubt on this matter, the agency of the State of New Jersey that is responsible for the registration of foreign corporations and their agents, the New Jersey Department of State, recently stated that it is its position that a foreign corporation must qualify to do business in New Jersey before it can designate a registered agent for services of process. See Letter of Frank Capece, Executive Assistant to the Secretary of State, to James Freis, dated October 22, 1981, reproduced in Appendix A to this Reply Brief.[10]

[10]The original of this letter has been filed with the Court.

B. In Any Event, New Jersey Law Improperly Conditions The Availability Of The Statute Of Limitations On A Corporation's General Consent To Suit In The State.

In any case, Searle has demonstrated that the New Jersey law would be a *per se* violation of the Commerce Clause even if there were a procedure for registering an agent without also qualifying to do business in New Jersey. This is because registration of an agent would, under established principles, constitute Searle's waiver of its rights under the Commerce[11] and Due Process Clauses not to be subject to suit in a State if the "minimum contacts" test of *International Shoe* is not satisfied.[12] Pet. Br. pp. 19-22.

Respondents now appear also to contend (Resp. Br. pp. 27-28) that Searle's appointment of an agent will not subject it to any suit in New Jersey which would not satisfy the test under the Due Process clause of "fair play and substantial justice." Respondents' argument is flatly contrary to the long line of decisions (see n.12 *supra*) holding that such consent is an independent ground for *in personam* jurisdiction, whether or not the minimum contacts test is satisfied.[13] This contention is further contradicted

[11]See *Davis* v. *Farmers' Co-operative Equity Co.*, 262 U.S. 312 (1923); *Scanapico* v. *Richmond, F. & P. R.R. Co.*, 439 F.2d 17, 25-26 (2nd Cir. 1970) (en banc) (Friendly, J.)

[12]*Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining Co.*, 243 U.S. 93 (1917); *Neirbo Co.* v. *Bethlehelm Shipbuilding Corp. Ltd.*, 308 U.S. 165 (1939); *National Equipment Rental, Ltd.* v. *Szukhent*, 375 U.S. 311 (1964); *Litton Industrial Systems, Inc.* v. *Kennedy Van Saun Corp.*, 117 N.J. Super 52, 283 A.2d 551, 555-56 (Law Div. 1971); see *Adam* v. *Saenger*, 303 U.S. 59 (1938).

[13]Perhaps respondents are arguing that this Court or the New Jersey Supreme Court might someday overrule the earlier decisions and hold that the appointment of an agent is consent only where *in personam* jurisdiction is consistent with the "minimum contacts" test. However, that would eliminate one basis for the Court of Appeals' conclusion that the statute promotes local interests. Moreover, the possibility of future ac-

(Footnote continued on following page.)

by respondents' own argument (Resp. Br. p. 26) and the Court of Appeals' and New Jersey Supreme Court's holdings that a purpose of the tolling statute is to coerce consent to jurisdiction and thus spare plaintiffs the burden of proving that long arm jurisdiction is consistent with Due Process.[14]

(Footnote continued from previous page.)
tion would not eliminate the interference with interstate commerce. To require out-of-state corporations to register agents and then bear the burden of persuading courts that the appointment of an agent should not be treated as consent to all suits would impose added costs on out-of-state companies and thus impermissibly discriminate against interstate commerce.

[14]Respondents further contend (Resp. Br. p. 28) that registration of an agent will not broaden Searle's exposure to suit in New Jersey because "the application of the Tolling Provision is limited to [where] the cause of action arose in New Jersey or the aggrieved party is a New Jersey resident." This is a *non sequitur* and is simply wrong. There are many suits that New Jersey residents could attempt to bring against Searle in New Jersey that would not satisfy the minimum contacts test and that would be barred, absent consent. Pet. Br. pp. 23-24. Moreover, the scope of the tolling statute is irrelevant to the question of the consequences of the appointment of an agent. The rule in New Jersey is that such an appointment constitutes consent even when the suits are unrelated to New Jersey. *Litton Industrial Systems, Inc.* v. *Kennedy Van Saun Corp.*, 117 N.J. Super. 52, 283 A.2d 551, 555-56 (Law Div. 1971).

CONCLUSION

For the reasons stated in this Reply Brief as well as those in Petitioner's Opening Brief, the judgment of the United States Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

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Appendix A

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FRANK CAPECE
ASSISTANT TO THE SECRETARY OF STATE

October 22, 1981

James H. Freis, Esq.
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Dear Mr. Freis:

In response to your recent letter, please be advised that it is the view of the Department of State that unless a foreign corporation has qualified to do business in New Jersey, they are unable to designate a registered agent for service of process.

Very truly yours,

Frank Capece
Executive Assistant
to the Secretary of State

FGC/vd